

Forensic Nurse
Examiner Testimony
Estate v. Luperz and Estate v. Holt

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Forensic Nurse Examiner testimony

State v. Lopez and State v. Hill

Forensic Nurse Examiner testimony

State v. Lopez and State v. Hill

Forensic Nurse Examiners

FNSEA is a void in our medical system, providing critical testimony to juries in a form of great physical, emotional, and psychological vulnerability.



For more information, please contact us at 800-877-8777 or visit our website at www.fnsea.org

Forensic Nurse Examiners

Our Forensic Nurse Examiners are the only ones who can provide the critical testimony to juries in a form of great physical, emotional, and psychological vulnerability.

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FNSEA

Forensic Nurse Examiner Program for Domestic Violence Strangulation Assaults

- Started as a pilot program in December 2011
- Chandler and Glendale were test cities
- Formally established county-wide June 2012
- Purpose -- to provide critical medical care to high lethality victims of domestic violence.

Forensic Nurse Examiners

FNEs fill a void in our medical system, providing critical treatment to patients at a time of great physical emotional, and psychological vulnerability.



State v. Hill 236 Ariz 162, (citing State v. Mendez 242 P.3d at 339-40(NM 2010).

Forensic Nurse Examiners

But they also have special expertise in gathering evidence for subsequent prosecution for the offender.

State v. Hill 236 Ariz 162, (citing
State v. Mendez 242 P.3d at
339-40(NM 2010)

Forensic Nurse Examiners

Which raises appropriate concerns about whether the statement was made for the purposes of seeking medical care or whether a medical adviser could have reasonably relied upon the statement for diagnosis or treatment of the declarant.

State v. Hill 236 Ariz 162 (citing State v. Mendez 242 P.3d at 339-40 (NM 2010)).

The Exam and Courtroom Testimony

An FNE, like a medical provider has to ask questions and listen to the answers of the patient to provide medical treatment.

Those answers and the questions (to give the answers context) may be the subject of courtroom litigation in a criminal case.

Two Roadblocks to FNE Testimony

- Confrontation Clause of the United States Constitution (the 6th Amendment)
- Hearsay Objection

Confrontation Clause

Crawford v. Washington:

US Supreme Court held that a "testimonial" statement by a witness who does not appear at trial must be excluded under the Confrontation Clause unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination.

Confrontation Clause

Davis v. Washington / Hammon v. Indiana:

The Court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Confrontation Clause

Davis v. Washington / Hammon v. Indiana:

On the other hand, statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Confrontation Clause

Michigan v. Bryant:

To determine the primary purpose requires an objective evaluation of the facts relating to the exchange.

Hearsay-- Statements Made for Medical Treatment and Diagnosis

Two part test for admissibility:

- (1) whether the declarant's apparent motive was consistent with receiving medical care; and
- (2) whether it was reasonable for the physician to rely on the information in diagnosis or treatment.

State v. Robinson, 153 Ariz., 191, 199 (1987)

State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Facts: Victim sexually assaulted. Taken to hospital where she is treated by an RN / SANE. Part of the exam includes the victim recounting what happened to her. That statement is recorded in the "History" section of the exam.



State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Facts: Victim testifies at trial and so does Nurse. Nurse relates "History" section to jury. Defendant objects.



State v. Lopez

217 Ariz. 433 (Div. 2 2008)

Medical Hearsay -- 803(4)

Nurse testimony about Exam and relevance of history section

STATE OF ARIZONA SEXUAL ASSAULT EXAMINATION REPORT		Agency Name Report # Medical Record # Patient Name Date of Birth: / /	Date of Exam: / /
AUTHORIZATION I authorize (Name of Examinee) to perform a medical forensic examination, provide treatment, collect evidence, and photograph injuries. I also give permission to release of copies of the complete report to law enforcement for purposes of continuing an investigation.			
Date: / / Signature of Patient, Parent, or Guardian If patient is child, who accompanied child for exam? <input type="checkbox"/> Yes <input type="checkbox"/> No		Signature of Nurse Name: _____	
HISTORY AND PHYSICAL EXAMINATION:		Examination beginning time: _____ Examination ending time: _____	
A. Medical History:			
Speak in language other than English? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, specify language: _____		Interpreter Name: _____	
Past Medical History/Surgery: _____ Current Medications: _____ Allergies: _____ Last Trauma: _____ Date of last medical (injury)? <input type="checkbox"/> Yes <input type="checkbox"/> No Does patient use <input type="checkbox"/> tobacco? <input type="checkbox"/> alcohol? <input type="checkbox"/> drugs?			
B. Assault History: As related by <input checked="" type="checkbox"/> Patient <input type="checkbox"/> Guardian <input type="checkbox"/> Other (Name): _____ Date of Assault: _____ Time of Assault: _____ Description of Assault: _____			

State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

"Looking for injury is the main purpose"

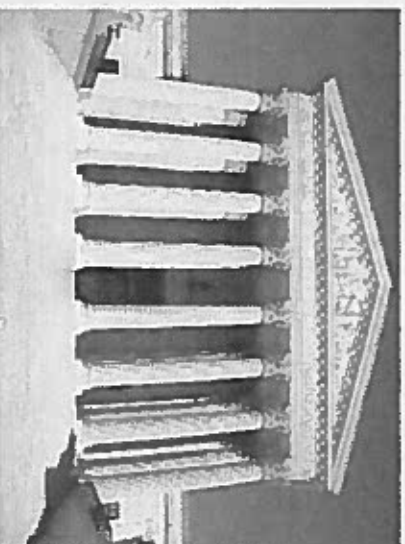
I ask the person what happened during the examination
to determine "where to look for injury"



State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Court applies a two part test to determine admissibility:

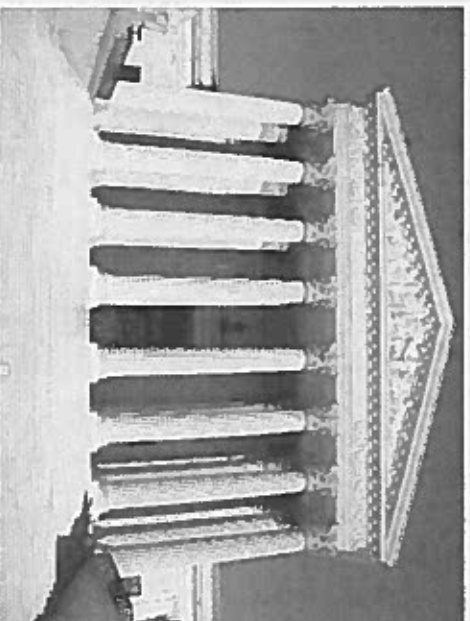
- (1) Whether the declarant's apparent motive was consistent with receiving medical care; and
- (2) Whether it was reasonable for the physician to rely on the information in diagnosis or treatment.



State v. Robinson, 153 Ariz., 191, 199 (1987)

State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Court recognizes the SANE has dual roles: (1) To provide medical treatment, and (2) to collect evidence.



State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

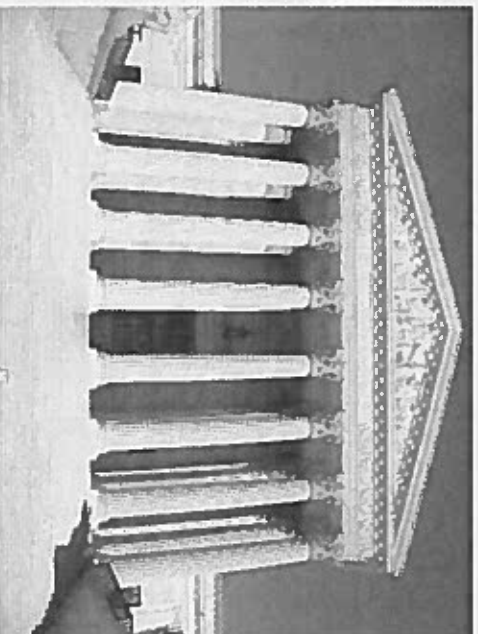
Important reasoning to the Court:

- in other jurisdictions statements are admissible when relevant to diagnosis or treatment.
- statements about events **before** sexual assault or describing what an **unknown** assailant looked like have been inadmissible as not relevant to diagnosis or treatment.

State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Trial tip: You must parse out each statement during medical exam and have facts / argument as to why that each statement is relevant to diagnosis or treatment.

"the focus is on the statement, not its recipient."



Victim's statement about her attacker telling her not to look at him, not admissible under 803(4).

State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Statements upheld: (1) Victim's motive consistent with receiving medical care; and (2) it was important to get an accurate history of what happened in order to know where to look for injury.



State v. Lopez
217 Ariz. 433 (Div. 2 2008)
Medical Hearsay -- 803(4)

Trial tips:

- (1) Highlight any injury found.
- (2) Make sure the nurse testifies as to what treatment was given.
- (3) Treatment includes referring to further treatment / care, to social worker, for prescription, pregnancy test, etc.
- (4) In pretrial preparation and trial consider asking why _____ was done. Usually its because there is a medical need or medical question that needs resolving.

State v. Hill

236 Ariz. 162 (Div. 1 2014)

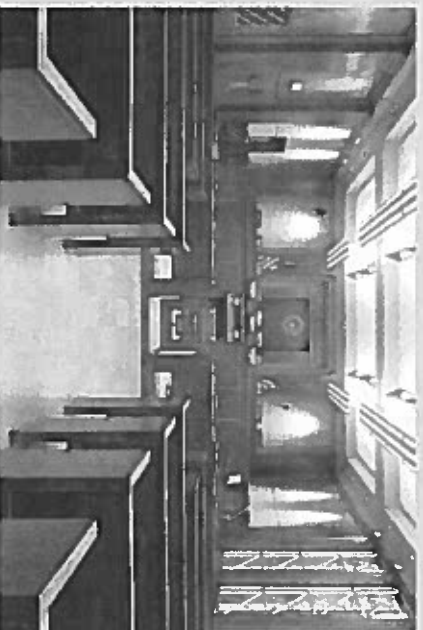
Confrontation Clause

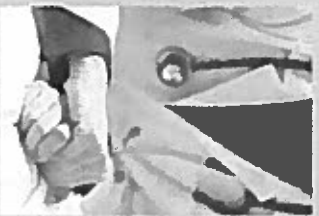
Facts: Victim sexually assaulted. Taken to ER in premature labor where she is treated by a FORENSIC NURSE. Part of the exam includes the victim recounting what happened to her. That statement is recorded in the "History" section of the exam.



State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

Facts: Victim dies before trial (unrelated). FNE testifies at trial regarding her exam and victim's statement in the History portion of the exam.





State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause



FNE Testimony:

- (1) Two components to the exam -- providing medical care AND collecting evidence.
- (2) No police present. Mesa PD was the police agency.
- (3) Recorded vital signs, nature and location of pain as reported by victim, neurological signs, breath and bowel sounds.



State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause



FNE Testimony:

(4) I begin examine by asking victim about medical history and the sexual assault.

- Obtaining assault history is "part of normal nursing care and it guides my treatment. It tells me what I'm going to do or not do"
- "my job is to be a nurse first"

State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

FNE Testimony:

When asked how the assault history portion was obtained, "completely open ended question... I say tell me why you are here."



State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

Facts: After exam victim released back to ER staff with a recommendation that she be given medication to prevent sexually transmitted diseases and that she make a return appointment.



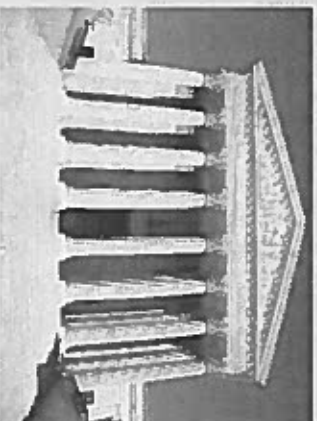
State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Following Crawford, Davis, and Bryant --

In determining whether the court erred in allowing the nurse to recount the victim's statement, we must evaluate objectively all the facts concerning the exchange that produced the statement to determine the **primary purpose** of the nurse's question to the victim and the victim's response.



State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

A victim's statement to a medical professional is more likely to be **non-testimonial** when the victim is examined in a hospital emergency room, where the ***medical necessity of the examination*** is more pronounced.





State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause



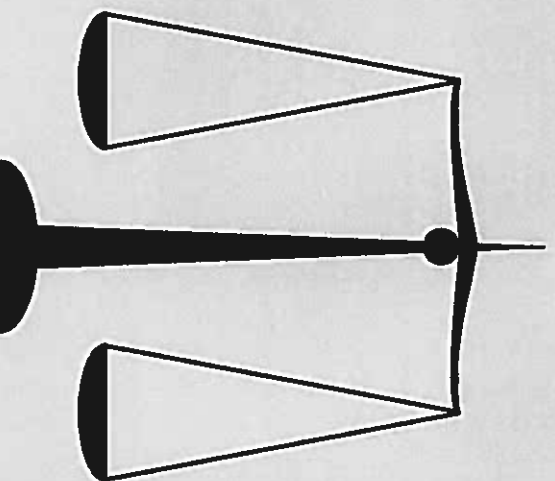
Because forensic medical examinations often have **two purposes** -- to gather evidence for a criminal investigation and to provide medical care to the victim -- whether a victim's statement in response to a question by the examiner is testimonial for the purposes of the CC turns on whether the surrounding circumstances, objectively viewed, show that **the primary purpose of the exchange at issue was to provide medical care or to gather evidence.**

State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Whether statements are testimonial is a highly context-dependent inquiry requiring analysis of the totality of the circumstances.



State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

The focus must always be on the **PURPOSE** of the particular exchange between the declarant and the testifying witness in which the statement was made.

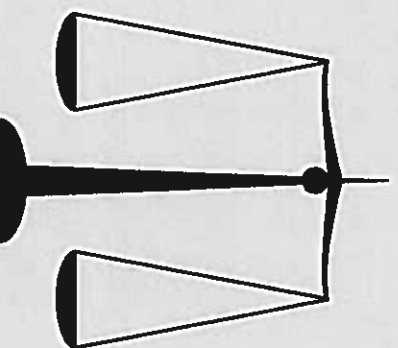


State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Trial tip: Lay out the medical necessity of the treatment with your medical professional. Doctor or non-forensic medical provider versus forensic? Emergency versus non emergency?



State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

If the primary purpose of the encounter is the provision and receipt of medical care, the statement is non-testimonial, regardless of whether the care sought is for an emergent condition.



State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Factors that weigh towards admissibility:

- exam took place in ER
- V in premature labor
- Question that elicited statement was the same kind of question you get from any ordinary medical exam -- "Why are you here?"
- standard medical assessment with recorded results

State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Factors that weigh towards admissibility:

- No LE presence during any part of exam
- Not recorded
- Nurse recommended prophylactic preventative treatment
- follow up appointment for medical care
- V remained in ER for observation

State v. Hill
236 Ariz. 162 (Div. 1 2014)
Confrontation Clause

Factors that weigh against admissibility:

- FNE did the exam
- collected DNA to forward to LE
- recorded results and victim's statement on form issued by LE

State v. Hill

236 Ariz. 162 (Div. 1 2014)

Confrontation Clause

Tipping Point:

The victim's statement was obtained at the **beginning** of the exam, **before any evidence was collected** of victim's injuries. The open ended question ("Tell me why you are here"), posed to the victim in the ER, was **not aimed at collecting evidence** but at gathering information about the victim's medical condition.

Two Tests: (1) Hearsay and (2) Confrontational Clause

Hearsay:

- (1) Whether the declarant's apparent motive was consistent with receiving medical care; and
- (2) Whether it was reasonable for the physician to rely on the information in diagnosis or treatment.

State v. Lopez 217 Ariz. 433 (Div. 2 2008)

Two Tests: (1) Hearsay and (2) Confrontational Clause

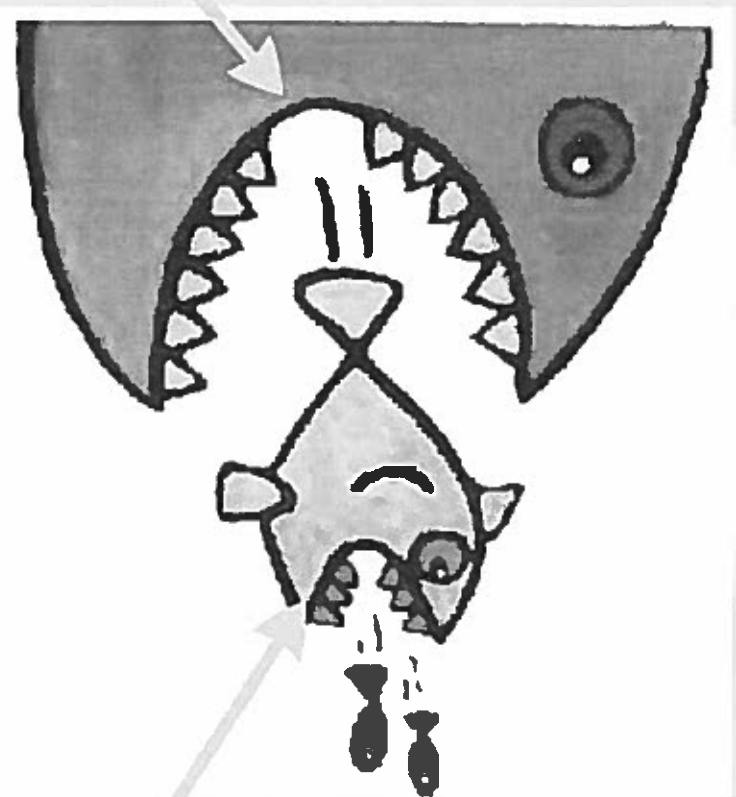
Confrontational Clause:

If the primary purpose of the encounter is the provision and receipt of medical care, the statement is non-testimonial, regardless of whether the care sought is for an emergent condition.

State v. Hill 236 Ariz 162 (Div. 1 2014)



Are there really two tests?



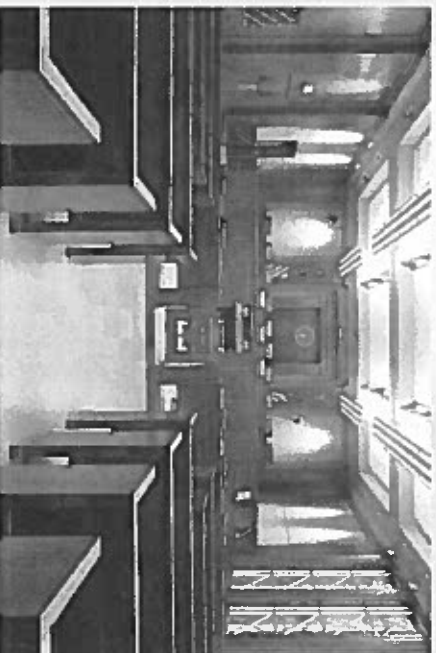
Hearsay Test

Confrontational
Clause Test

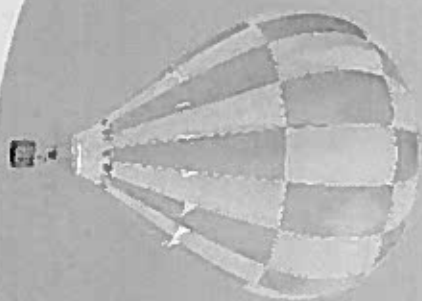
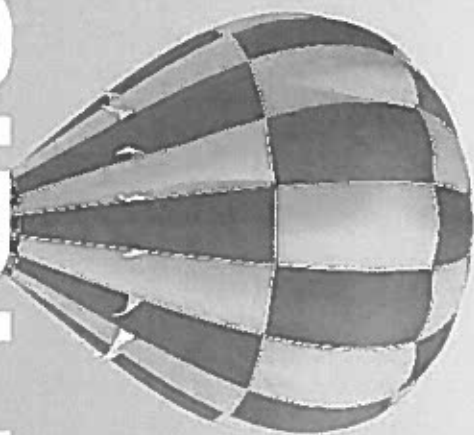
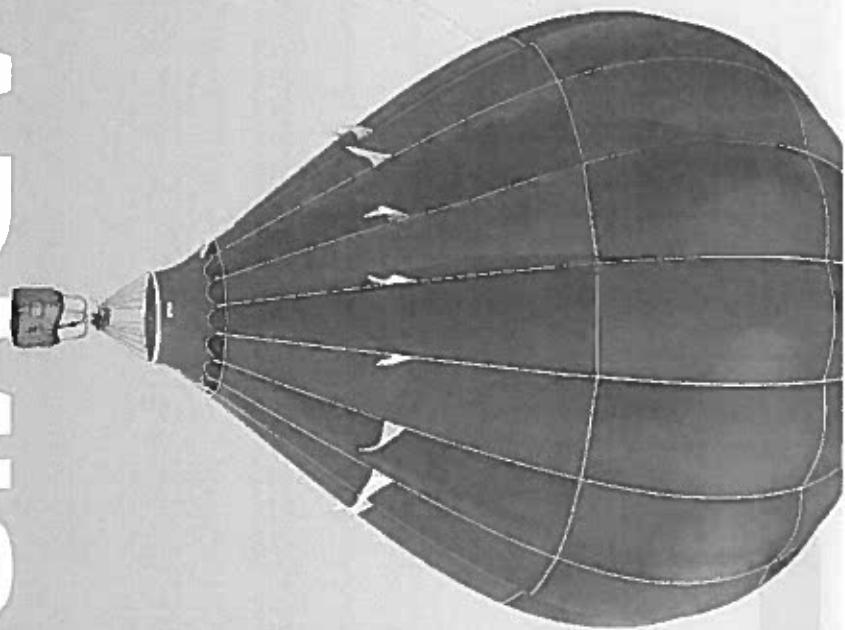
Medical Testimony

Trial Tip:

Break down each statement. Marshall facts to demonstrate that statement has medical need and relevance. Lay out the two tests for the Court and demonstrate how the statements satisfy both tests.



ADMISSIBLE!



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Forensic Nurse Examiners

FNs fill a void in our medical system, providing critical treatment to patients at a time of great physical, emotional, and psychological vulnerability.



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Forensic Nurse Examiners

Our role is to help with the investigation of violent crimes by providing forensic nursing services to law enforcement.

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